OPENING STATEMENT

OF

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CHAIRMAN, SUBCOMMITTEE ON SECRECY AND DISCLOSURE

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These hearings culminate a year long study by the Secrecy and Disclosure Subcommittee of the Intelligence Committee. We have been concentrating in this first year upon the impact of secrecy on the enforcement of the law and the administration of justice. We have come to the surprising conclusion that the inevitable tension between the rule of law and the secrecy necessary for intelligence operation has at times, in my opinion, undermined both the rule of law and secrecy. These hearings will explore that phenomenon and hopefully will lead to a public discussion which will result in a better accommodation between law enforcement and secrecy.

We examined first the leak cases -- that is, cases of unauthorized disclosure of secrets to the public media -- and then classical espionage cases. We learned in our year-long study that at times desire to preserve secrecy can undermine the criminal sanctions intended to enforce secrecy. Leaks of classified information and the covert transmission of secrets to agents of a foreign power can and do at times go unpunished. Investigations stop because of fears -- and I emphasize legitimate fears -- that further investigation or prosecution of the crime will result in the further necessary disclosure of very sensitive information that will undermine national security.

Our concern over this problem deepened as we learned that the fear of disclosure of intelligence information could also frustrate investigation and prosecution of crimes less directly related to the national security, including perjury to Congress, narcotics violations, possible violations of the intelligence community legislative charters, and may even have affected one murder case. The purpose of these hearings is to discuss this problem, to the extent that it can be discussed publicly, and to search for solutions.

We will have difficulties of course in discussing this problem in public hearings. We do not want to do further damage to the national security by disclosing exactly what we found in any one of the files we have reviewed. In practically every actual case we have reviewed there were real national secrets at stake and at least a reasonable argument for foregoing indictment and trial.

In order to provide focus for the hearings and to keep the discussion from becoming too amorphous, I asked the Subcommittee staff to prepare an unclassified memorandum for use in these hearings which would accomplish two goals:

First, it would summarize the results of the staff review and, second, it would create hypothetical cases based on review of the case files which we could use in the public hearings.

I should also mention a few caveats about the staff memorandum. It is a tentative summary of the staff's review of the files and represents neither a final judgment nor a formal position. But we have discussed the main finding both in the intelligence community and at the Department of Justice, and have found rough agreement on many -- but not all -- points. I am sure every Member and his staff will review these files before we adopt a formal Committee position on this matter.

Second, we have attempted, in developing these hypothetical cases, not to even give the impression that they are variations on actual cases. I know that it is tempting for members of the press to take the cases and extrapolate the facts in the hypotheticals on to real cases. To those members of the press who are so inclined I must emphasize that you do so at your own peril. The only relationship between the hypothetical cases and real cases is the role that the fear of disclosure of classified information played in the Executive branch decision not to proceed with investigation or prosecution.

Before proceeding with the hearings, I will read an excerpt from the staff memorandum:

"III. SUMMARY OF FINDINGS

Our inquiry into the over forty actual cases has led the staff to the following conclusions:

(A) There is a major breakdown in the administration of the criminal espionage statutes in leak cases. To date,

we have been unable to identify a single successful prosecution of an individual who leaked classified information to a publication. This record was found despite the nearly unanimous assessment that at least some leaks cause serious harm to our national security.

(1) The breakdown results in part from an impasse between the Department of Justice and the intelligence community on how to deal with the use of classified information necessary for investigation and prosecution of these cases. Briefly stated, there is no formal mechanism to weigh the risks of further disclosure against the benefits of prosecution.

(a) The common circumstance in leak cases is that the intelligence agency whose information is leaked also possesses the information and expertise necessary to investigate or prosecute the leak.

(b) In some cases we have reviewed, it appears that the victim agency and the Department of Justice, in effect, create an unnecessary dilemma or impasse in order to frustrate investigation or prosecution for other reasons, including:

(i) Prosecution of a leak through confirmation of the leak will damage the agency's

reputation for keeping secrets and thereby undermine its ability to obtain confidential information from intelligence agencies both at home and abroad.

(ii) The leak was from a high agency official who acted without any higher authority but the judgment is made that pursuit of the investigation would embarrass the official.

(iii) The leak is actually an authorized disclosure and pursuit of the investigation would be unjust.

(2) The unauthorized public disclosures of classified information which endanger national security -- are only a small portion of the intelligence product which is leaked routinely to the news media. Officials often make unauthorized disclosures of classified information in an attempt to influence public debate in a manner they believe to be in the national interest. In attempting to serve their view of the national interest some damage to the sources and methods of intelligence collection may be inflicted. These leaks, in other words, are the "mistakes" that occur in the widespread sub rosa practice of providing selected intelligence information to the news media. And this creates serious problems:

(a) Because the process is informal and quasi-legal, there is no way to ensure that the public receives a balanced selection of intelligence information that is important to the public debate about defense and foreign policy.

(b) The same hit or miss system that short-changes the public on one hand, also results in occasional compromise of sensitive intelligence information. Insofar as the Subcommittee staff could determine, most compromises were accidental by-products of a disclosure made to accomplish some other purpose. Typically, a disclosure about Soviet plans for a new ICBM might accidentally compromise the source of that information.

(3) Disagreements over the use of classified information also impedes classical espionage prosecutions.

(1) However, the likelihood that there will be a consensus resolution of the disagreement is much more likely for the following reasons:

(a) Because classical espionage cases are generally considered more serious than leak cases.

(b) Because the federal espionage statutes are more clearly drawn to cover classical espionage than leaks.

(c) Many classical espionage cases are in effect out of the control of the intelligence community because the law enforcement machinery has been engaged by an arrest or because the public or officials outside the intelligence community know of the crime and, therefore, create pressure on the intelligence community to provide information necessary for prosecution.

(d) Usually the constitutional problems (primarily First Amendment problems) are much less severe in classical espionage cases than they are in leak cases.

(2) However, we have reviewed classical espionage cases which have not proceeded to either investigation or prosecution for the same reason that leak cases cannot proceed -- concern about the disclosure of intelligence information in the course of investigation or prosecution. Furthermore, we know of cases where the disagreements between the intelligence community and the Department of Justice over classical espionage cases almost required Presidential intervention to resolve the disagreement.

(C) The impasse over the use of classified information occurs in other types of criminal cases and at times the Department of Justice may have been placed at a marked disadvantage

because of this dilemma by defendants in perjury, narcotics, and even murder cases. "

Before turning to Senator Pearson, I would like to make one final comment about the spirit in which I hope these hearings will be conducted. These are not adversary proceedings, for Members of the Committee and the intelligence community agree on the seriousness of this problem. Indeed, I doubt that the findings that I have just read are news to experienced intelligence officers.

Therefore, I hope we will spend our energies in these hearings seeking solutions. We will hear a large variety of proposals ranging from new in camera procedures, recasting espionage statutes so that there is less jeopardy to secrets in the presentation of criminal cases, and even establishing new types of administrative tribunals for dealing with intelligence employees who violate the law. In these hearings and in the weeks and months to come I look forward to working with you Admiral Turner, and other witnesses in a spirit of cooperation and accommodation in the hope that we can find a solution to this most vexing problem.